In the Supreme Court of the United States.

October Term, 1901.

No. 491.

The City of New York and Bird S. Coler, as Comptroller thereof,
Appellants.

against

Samuel Pine and Frederick Muller.
Appellees.

Memorandum by the Corporation Counsel of the City of New York in reply to the additional brief submitted by counsel for the appellees.

Counsel for the appellees having been permitted by the Court to submit an additional brief, counsel for the appellants submits the following in reply:

The supplemental brief for the appellees is in substance a mere restatement of a part of their original brief and of their oral argument. Their contention is that the property of the complainants in the flow of the Byram river is prop-

erty "inseparably attached to and a constituent element of their freeholds in Connecticut," and is indeed "real estate in Connecticut." Quoting *Scriver* vs. *Smith*, 100 N. Y., 479, they assert that "while the right has some semblance of an easement it is not, in fact, a real easement, but a corporeal right."

The cases cited by the learned counsel for the appellees are, we believe, all cited upon their original brief, and all but two of them are cited and commented upon in the brief heretofore filed by the appellants. It does not seem necessary at this stage of the case to renew a discussion of their meaning and effect.

We respectfully submit that the technical form of the right which the complainants may possess in the flow of the Byram river cannot be decisive of the present appeal. Whether that right be defined as an easement or as a corporeal right, the fact remains that the physical *thing* taken by the State of New York, namely the water, is within its own jurisdiction. The *right* of which the complainants are thereby deprived is no doubt a right in the nature of property; but only in a remote and metaphorical sense can it be said that the State of New York by any acts which it has committed or authorized within its own jurisdiction has invaded the State of Connecticut.

The physical acts by which the complainants allege they were deprived of their property were, it is conceded, committed upon the soil of the State of New York. It is true that the consequences of these acts to the complainants, whatever such consequences may have been, were felt in the State of Connecticut; but we insist that in no proper sense of the word can it be said that the State of New York has actually taken property situated in another State.

Whether the plaintiff's right in the flow of this stream ought in strictness to be called an incorporeal or a corporeal hereditament, it is certain that, under the decisions, such flow is liable to be lawfully diminished to some extent by the use of the upper owners along the stream. As has been well said by the Court of Appeals of the State of New York in *Strobel* vs. *Kerr Salt Company*, 164 N. Y., 303:

> "As the enjoyment of each must be according to his opportunity, and the upper owner has the first chance, the lower owners must submit to such loss as is caused by *reasonable use*. * * * The question of reasonable use is generally a question of fact."

We recapitulate our argument as follows:

A. The State of New York may lawfully divert and use any waters found within its limits.

B. Even if the Court is not prepared to adopt so broad a proposition as this, yet it should allow the State of New York *reasonable use;* and under the circumstances of the present case, the use we make is reasonable.

C. In any event, it is inequitable to grant a writ of injunction in a case like the present; and we suggest that the following general rule might well be laid down, viz.:

Where it would be obviously oppressive and inequitable to restrain a public body, acting under the sanction of law, and using for public purposes, the water which it finds in its own State, and where the injury to lower riparian owners in another State is relatively small and

is capable of full and just compensation in money, a writ of injunction should not issue unless the payment of money compensation is refused.

Dated March 13, 1902.

GEORGE L. RIVES,
Corporation Counsel.